

BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

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Petition of Wisconsin Public Service Corporation for Declaratory Ruling Regarding Right to Self-Supply Station Power to Fox Energy Center	) ) ) ) )	Docket No. 6690-DR-109
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**CITY OF KAUKAUNA'S  
RESPONSE BRIEF**

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The City of Kaukauna ("Kaukauna") submits this Response Brief in response to the May 21, 2014 Initial Brief submitted by Wisconsin Public Service Corporation ("WPSC" or the "Company") in support of its Petition for Declaratory Ruling. For the reasons stated below and in KU's Initial Brief, the Public Service Commission of Wisconsin ("PSCW" or the "Commission") should dismiss the Petition on the grounds that Kaukauna Utilities ("KU") has the exclusive right to continue to supply retail electric service (including station power) to the Fox Energy Center ("Fox Energy") and that that right is not superseded by federal law.

**INTRODUCTION**

At stake in this proceeding is the integrity of territorial agreements that have been approved by this Commission as being in the public interest under Wis. Stat. § 196.495.<sup>1</sup> These territorial agreements, such as the one between WPSC and KU ("Territorial Agreement" or "Agreement"), serve the central public policy purposes of the anti-duplication statute: avoidance of the duplication of facilities and protection of the environment and ratepayers from unnecessary and costly overbuilds. They also help utilities avoid costly litigation over which utility has the right to provide electric service in a given area. This Commission is charged with

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<sup>1</sup> This statute is known as the anti-duplication statute, and it establishes a public utility's or electric cooperative's rights to serve customers and premises at retail.

enforcing such agreements under Wis. Stat. § 196.495(4) and, by enforcing these agreements, the Commission furthers the purposes of the statute.

The Territorial Agreement before this Commission is clear and unambiguous. Each party has the exclusive right to serve all customers and premises on its side of the Boundary Line established in the Agreement. The only exceptions to this right are the customers and premises one party has allowed the other to serve within its service territory (these exceptions are set out in Exhibits B and C of the Agreement). Pursuant to the Territorial Agreement, KU has the exclusive right to serve the Fox Energy facility at retail, which includes the provision of station power, because the premises at issue are on KU's side of the Boundary Line, and KU has not consented to allow WPSC to take over the provision of station power to the facility.<sup>2</sup> To achieve the purposes of the Agreement, each party waived various rights, including the right to serve its own facilities under Wis. Stat. § 196.495(3). WPSC cannot point to any provision of state or federal law that grants it the exclusive right to provide station power remotely to Fox Energy. Moreover, contrary to WPSC's unsupported assertions, Schedule 20 of the Midcontinent Independent System Operator ("MISO") Tariff does not pre-empt Wisconsin law or this Commission's jurisdiction in enforcing the plain terms of a territorial agreement approved by this Commission pursuant to state law. Accordingly, the Commission should dismiss the Petition and affirm KU's right under the Territorial Agreement to continue to provide station power at retail to Fox Energy. If the Commission chooses not to enforce the Agreement, this will undermine the integrity of all such agreements.

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<sup>2</sup> Of course, WPSC provides station power to the facility when the facility is running; this is not the retail provision of service. It is when the facility is not running that KU provides the station power. KU is not contesting WPSC's right to self-supply station power from the facility itself.

## **ARGUMENT**

### **I. NEITHER STATE NOR FEDERAL LAW GRANTS WPSC THE ABSOLUTE AND EXCLUSIVE RIGHT TO SELF-SUPPLY STATION POWER REMOTELY.**

#### **A. Schedule 20 Does Not Grant WPSC the Absolute and Exclusive Right to Self-Supply Station Power to Fox Energy.**

The central flaw in the Company's argument is its claim that Schedule 20 of the MISO Tariff grants generation owners the exclusive and absolute right to self-supply their generation facilities remotely. The Company argues that Schedule 20 "authorizes the practice" by recognizing that a facility owner "may" self-supply its facility in one of two ways – on site and remotely. WPSC Br. at 4. KU agrees that Schedule 20 recognizes that a facility owner may supply station power to its units. However, without pointing to any explicit language in Schedule 20 and without citing even one decision by the Federal Energy Regulation Commission ("FERC") or a federal court that supports its reading of Schedule 20, WPSC asks this Commission to leap to the conclusion that Schedule 20, in so recognizing that facility owners may self-supply, actually grants a facility owner the exclusive and absolute right to self-serve remotely whenever it chooses to do so. This argument is without merit.

Schedule 20 grants no absolute self-service rights. It simply allows or recognizes three possible sources of station power: (1) on site self-supply, (2) remote self-supply, and (3) third-party supply. Moreover, WPSC fails to address an obvious hole in its argument. That is, Schedule 20 also "authorizes the practice" of the provision of station power by third-party providers. The Company's logic could also be used to argue that any third-party would have the absolute right to supply station power to another's facility whenever it chose to do so. Of course, this is not how Schedule 20 should be read any more than it should be read to grant facility owners an absolute right to self-supply remotely.

Thus, while self-supply is allowed under Schedule 20, nowhere does Schedule 20 grant the generation owner the right to self-supply remotely where, as here, the facility owner does not otherwise have the right to do so. Accordingly, the Commission should conclude that nothing in Schedule 20 trumps KU's exclusive right under the Territorial Agreement and Wis. Stat. § 196.495 to continue providing retail service, including station power, to the Fox Energy facility.

**B. WPSC Does Not Have the Right to Serve Fox Energy Under the Territorial Agreement or Wis. Stat. § 196.495(3).**

Despite the fact that Schedule 20 authorizes the self-supply of station power, WPSC may not self-supply Fox Energy remotely because the Company has waived any right it had to serve the facility under Wisconsin law. Pursuant to Wis. Stat. § 196.495 and the Territorial Agreement, KU alone has the exclusive right to supply station power to Fox Energy under its retail tariff, and Schedule 20 does not divest KU of that right.

**1. A Public Utility's Right to Self-Serve Under Wis. Stat. § 196.495(3) Is Eminently Waivable.**

WPSC argues that a public utility cannot waive its private right to self-serve under Wis. Stat. § 196.495(3) since that right serves the public policy purpose of protecting the consuming public. WPSC Br. at 5. This argument is mistaken.

First, WPSC offers a very strained and unreasonable reading of Wis. Stat. § 196.495(3). WPSC points to the introductory clause of subsection (3) (i.e., "[n]othing in this section . . .") and the public policy behind § 196.495 to argue that this particular private right is unwaivable. KU agrees that the central public policy behind the anti-duplication statute is the avoidance of the duplication of facilities so that services may be efficiently provided to the consumer and to

protect the environment from unnecessary overbuilds.<sup>3</sup> Under WPSC's faulty reasoning, however, none of the other private rights granted in the statute could be waived because all such rights -- for example, the right to continue serving your existing customers/premises under Wis. Stat. § 196.495(1m)(a) -- serve the public policy purposes of the anti-duplication statute. Consequently, if the Commission were to accept WPSC's position that a private right cannot be waived if it serves a public policy purpose, there could be no territorial agreements.

In addition, each utility knows that when it enters into a territorial agreement that establishes a service territory boundary line, it is giving up all of its private rights under Wis. Stat. § 196.495 with respect to customers/premises on the other utility's side of that line. Utilities enter into such agreements so they can avoid disputes over service territory issues. In that way, the consumers are protected from the cost of protracted litigation over which utility has the right to serve, and the consumers also benefit from other efficiencies that may be gained through such agreements. Moreover, the PSCW may not put its stamp of approval on a territorial agreement unless it finds that the agreement is in the public interest. Thus, in adopting § 196.495(4), which allows public utilities to enter into territorial agreements, the Legislature has authorized utilities to waive their private rights under § 196.495, where doing so is in the public interest and of overall benefit to consumers and the environment. Accordingly, all the private rights to serve customers and premises either granted or protected under § 196.495 can be waived.

Moreover, WPSC's argument assumes that the public policy purposes of Wis. Stat. § 196.495 will be best served if it, rather than KU, supplies station power to Fox Energy. This is not the case. The central public policy purposes of the statute -- e.g., avoidance of the

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<sup>3</sup> See *Wisconsin Power and Light Co. v. PSC*, 45 Wis. 2d 253, 259, 172 N.W.2d 693 (1969) and *Complaint and Petition of Vernon Electric Cooperative for Declaratory Ruling*, Order, at p. 6, Docket No. 6080-DR-100 (October 6, 1994) (purpose of the anti-duplication statute is to protect consuming public from paying for unnecessary costs and to protect our state's environment from unnecessary projects that consume state resources).

duplication of facilities and protection of the environment and ratepayers from unnecessary and costly overbuilds – will not be contravened if KU continues providing station power to the Fox Energy facility. No lines will either need to be built or removed from service if WPSC, rather than KU, serves Fox Energy.

Furthermore, the fact that WPSC will save on expenses if it serves the facility rather than remaining KU's retail customer is not germane to the issue before the Commission. This Commission has long held that, in determining which of two competing utilities has the right to serve a particular customer under Wis. Stat. §196.495 (1m), it does not matter that the customer prefers the provider with the lower rates. That is because "[o]n matters of economy of service, the Commission must apply these laws to protect and benefit all ratepayers, not just individuals." *Complaint and Petition of Polk-Burnett Elec. Coop. for Declaratory Ruling on a Distribution Line Extension Made By Northern States Power Co.*, 1995 Wisc. PUC LEXIS 59, at p. 64, PSC Docket No. 4220-DR-106 (June 29, 1995), citing, *Adams-Marquette Electric Cooperative v. PSC*, 51 Wis. 2d 718, 727, 188 N.W.2d 515 (1971).

Here, of course, the Commission is not applying the statute to determine which utility has the right to serve. Rather, its mandate is to enforce the unambiguous terms of the Territorial Agreement. Therefore, it is not appropriate for the Commission to consider what financial impact its decision may have. If the Commission, however, were to consider the Company's cost savings by serving itself, the Commission then must also consider the dramatic impact the loss of this load will have on KU and its ratepayers. Since Fox Energy is one of KU's largest customers, the loss of this load would have a significant negative impact on KU and its ratepayers. KU's rate of return would decrease by about 0.7% and, after its next rate case, KU's rates would increase by 0.98% across all rate classes. See Exhibit 3 attached to the Stipulated Facts. In sharp

contrast, based on WPSC's reported retail sales for 2013 (\$969,328,855), the annual savings to WPSC ratepayers, assuming the Company would pass on any savings to its ratepayers, would amount to no more than an infinitesimal 0.079%. The difference in impact on the two parties and their customers is like the difference between a momentary flicker versus a week-long outage.

Finally, when Wis. Stat. § 196.495(3) is scrutinized more closely, one can only conclude that a utility's self-service right is waivable because it is the waiver of that right, not its exercise, that serves the public policy purposes of the statute. In order to allow a utility to serve its own facilities, the Legislature needed to include a "self-service carve out" in § 196.495 so that the utility could serve its own facilities even where such service would contravene the public policies purposes of § 196.495. For example, where the right to self-serve is not waived in a territorial agreement, a utility may make a primary voltage extension to serve one of its facilities that could be served more cost effectively and efficiently by a competing utility that could serve the facility from a secondary voltage extension.<sup>4</sup> Because this self-service carve out is antithetical to the public policy supporting the anti-duplication statute, the waiver of this right in a territorial agreement actually better serves the public policy objectives of the statute. Waiver of the right to serve one's own facilities in another utility's service territory will result in less duplication of facilities and more efficient service. Because of this, the right to self-serve under § 196.495(3) is eminently waivable.

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<sup>4</sup> For example, the PSCW approved the construction of a 2.4 mile-long distribution line so that, pursuant to Wis. Stat. § 196.495(3), the City of Wisconsin Dells could provide electric service to certain sewer lift stations that were outside of the city utility's service territory and which could have been more easily and more economically served by Wisconsin Power & Light Company ("WP&L") another utility. *See Application of the City of Wisconsin Dells, as an Electric Public Utility, for Authority to Construct Electrical Distribution Additions in the City of Wisconsin Dells, Sauk and Columbia Counties*, Certificate and Order, PSC Docket No. 6610-CE-110 (Mailed Nov. 22, 2005) (PSC REF#: 45065). It is important to note that Wisconsin Dells had not waived its self-service right in any territorial agreement with its wholesale supplier, WP&L.

**2. Pursuant to the Territorial Agreement, both KU and WPSC waived their rights to serve their own facilities under Wis. Stat. § 196.495(3).**

In making its argument that it did not waive its right to self-serve under the Territorial Agreement, the Company offers a tortured reading of Section 10 of the Agreement pertaining to Retention of Rights. WPSC Br. at 5-9. According to the Company, no right is waived in the Agreement unless there is “specific language that provides otherwise.” *Id.* at 6 (emphasis in original). Curiously though, the Company does not back up this assertion by citing any section of the Agreement where a right is waived with “specific” language. Certainly, if the Company’s reading of Section 10 were correct, it would be the case that the other rights that are waived would be specifically referenced in the Agreement. As KU points out in its Initial Brief (at 8-11), there is no specific language in the Territorial Agreement waiving rights that even the Company would agree have been waived. For example, there is no reference to the so-called 500-foot rule (§196.495(1m)(b)), yet that right was waived by the drawing up of the Boundary Line. Under the Agreement, neither party may exercise its statutory right to make a secondary voltage extension to serve a new premises, where that premises is on the other party’s side of the Boundary Line, even if the other party would have to construct a two-mile long primary voltage extension to serve the new premises.

As KU argued in its Initial Brief (at 11), the most reasonable interpretation of the Territorial Agreement and Section 10, in particular, is that each party waived **all** of its rights under Wis. Stat. §196.495 to serve customers and premises on the other party’s side of the Boundary Line, **except** where the parties agree to specific “Exceptions” under Section 5 of the Agreement. The Initial Exceptions are set out in Exhibits B and C. The only customers/premises that WPSC has the right to serve on KU’s side of the Boundary Line are located at the three addresses listed on Exhibit C. Certainly, if the parties had intended to allow



for other exceptions to the Boundary Line, those exceptions would be found either in these two Exhibits or would be specifically called out in Section 10. That is, if the parties had intended to retain their right to serve their own facilities on the other party's side of the Boundary Line that right would have been specifically retained in Section 10. For example, Section 10 would have read:

Except as specifically set forth herein, this Agreement does not modify or limit the legal rights of either party, including but not limited [to] KU's right under Chapter 197 of the Wisconsin Statutes. KU and WPSC may exercise all rights not inconsistent with this Agreement. **Notwithstanding the preceding sentence, each party maintains the right to serve its own facilities under Wis. Stat. § 196.495(3) regardless of the location of such facilities.**

Accordingly, the Commission should reject WPSC's contrary reading of Section 10 because it is unreasonable and would render the entire Agreement meaningless.

Ignoring the legal precedents on the issue, the Company argues that none of the sections of the Agreement pertaining to the right to serve "customers" applies here because a utility serving its own facility pursuant to Wis. Stat. § 196.495(3) is not a customer. WPSC Br. at 8. As KU points out in its Initial Brief at 6, this Commission has ruled that a premises being served by a public utility pursuant to § 196.495(3) is providing service to a "customer" as that term is used in the Commission's regulations interpreting § 196.495. *See Wisconsin Power & Light Company's Complaint Against the City of Wisconsin Dells as an Electric Public Utility*, Final Decision, PSC Docket No. 6680-DR-110 (Mailed June 5, 2007) (PSC REF#: 77115), *aff'd*, *Wisconsin Power & Light Co. v. Public Serv. Comm'n of Wisconsin*, 2009 WI App 164 ("WP&L Case"). Thus, Sections 2 and 4 of the Agreement definitely do apply to the facts presented here. These sections specifically, and the Agreement generally, establish KU's exclusive right to serve **all** customers and premises on its side of the Boundary Line, except for the three addresses listed on Exhibit C.

WPSC also argues that since it never anticipated buying Fox Energy, the Commission should conclude that the Agreement “does not address” the parties’ self-service rights under § 196.495(3). WPSC Br. at 8. However, in practically the same breath, WPSC makes the exact opposite argument and asks the Commission to conclude that the “Agreement expressly reserves WPSC’s right to self-supply station power to the Facility.” WPSC Br. at 9. No matter. The Company’s lack of foresight is not at all relevant because the language of the Territorial Agreement is clear, unambiguous, and, unlike WPSC’s argument, consistent. Each party serves all customers and premises on its side of the Boundary Line, except for those customers/premises listed on Exhibits B and C. Accordingly, the PSCW must enforce the Agreement regardless of whether there are circumstances that WPSC did not anticipate, such as its purchase of Fox Energy, when negotiating the Agreement. *See Kaitlin Woods Condo. Ass’n v. N. Shore Bank*, 2013 WI App 146, 352 Wis. 2d 1, 841 N.W.2d 562.

In *Kaitlin Woods*, one party to a contract appealed from a circuit court decision interpreting the contract on the grounds that the circuit court had disregarded the intent of the parties at the time of drafting. The appellant argued that the contract “did not anticipate” the particular situation at issue, and thus, the court should consider the parties’ intent. *Id.* ¶ 7. The court of appeals rejected the argument, stating “[i]f the contract is unambiguous, our inquiry is limited to the four corners of the contract and we do not consider other evidence as to what the parties intended.” *Id.* at ¶¶ 8, 17. Thus, what either party to the Territorial Agreement anticipated or did not anticipate is not relevant to the PSCW’s interpretation of the Territorial Agreement.

Finally, WPSC attempts to bolster its reading of Section 10 of the Territorial Agreement by mentioning that Wisconsin Electric Power Company (“WEPCo”) self-supplies station power

remotely to its Rothschild facility in WPSC's territory. WPSC Br. at 4 and 12. WPSC's arrangement with WEPCo has no bearing whatsoever on the matter before the Commission. The Company is suggesting that the Commission interpret the Territorial Agreement based on an unrelated territorial agreement it has with another utility, an agreement that is not even a part of the record.<sup>5</sup> The Company's dealings with other utilities is simply not relevant to the matter at hand, the enforcement of the Territorial Agreement.

Moreover, the WPSC/WEPCo arrangement has very little in common with the facts in this matter. Based on what KU knows about the WPSC/WEPCo arrangement, the circumstances surrounding the Rothschild facility are vastly different from those here and do not support the Company's position. For example, the Rothschild facility was never served by WPSC. WEPCo constructed the facility on the Domtar site (Domtar is a customer of WPSC) and WEPCo alone has provided station power to the facility. The Rothschild facility, unlike Fox Energy, has never been served at retail by either WPSC or WEPCo. Furthermore, since territorial agreements under Wis. Stat. §196.495 pertain solely to retail service, the right to provide station power to the Rothschild facility could not be governed by any WEPCo/WPSC territorial agreement.<sup>6</sup> Consequently, the fact that WEPCo is self-supplying station power to the Rothschild facility in WPSC's territory can have no relevance to the interpretation of the KU/WPSC Territorial Agreement.

In sum, WPSC does not have the absolute right to self-supply station power to Fox Energy remotely. The Commission must enforce KU's exclusive right under the Territorial Agreement to continue to supply station power at retail to Fox Energy.

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<sup>5</sup> See *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 2011 WI 54, ¶ 70, 335 Wis. 2d 47, 799 N.W.2d 73 (agency's actions must be supported by substantial evidence in the record).

<sup>6</sup> Because the WEPCo/WPSC territorial agreement is not part of the record, we do not know whether that agreement even pertains to the territory in which Domtar and the Rothschild facility are located.

## **II. THE PSCW'S AUTHORITY TO ENFORCE THE TERRITORIAL AGREEMENT IS NOT PREEMPTED BY FEDERAL LAW.**

Based on the bald assertion that Schedule 20 of the MISO Tariff grants the Company the exclusive right to provide station power to Fox Energy, WPSC goes on to argue that the Commission is thereby preempted from interpreting the Territorial Agreement in a way that “would restrict WPSC’s right under Schedule 20 of the MISO Tariff to transmit electricity in interstate commerce to self-supply station owner to the Facility.” WPSC Br. at 9. WPSC’s argument is once again internally inconsistent.

The Company essentially argues that it does not matter whether it waived its § 196.495(3) right to self-serve under the Territorial Agreement because it has the right to self-supply under Schedule 20 of the MISO Tariff and that trumps Wisconsin law. In making this argument, WPSC mischaracterizes KU’s argument. KU is not arguing that the Company, by entering into the Territorial Agreement, waived its right under Schedule 20 to supply station power remotely to Fox Energy. Rather, KU argues that Schedule 20 does not grant the Company the absolute right to self-supply Fox Energy and that, therefore, there is no absolute and exclusive right under federal law for the Company to waive. Schedule 20 makes clear that not only may a facility owner purchase station power at retail from a third party, but also that the schedule does not “supersede otherwise applicable jurisdiction of a state regulatory commission.” Schedule 20, Art. IV (Retail Purchase of Station Power).

Currently, Fox Energy is being served at retail by KU pursuant to KU's absolute and exclusive right to provide such retail service under the Territorial Agreement. Because this Agreement was approved by the Commission as being in the public interest, the PSCW must enforce it to preserve KU’s retail service rights. WPSC points to nothing in Schedule 20, or any decisions applying Schedule 20, that would prevent or pre-empt the Commission from doing so.

Although WPSC cites the *PJM Interconnection* decision (WPSC Br. at 10) for the proposition that the issue of whether the Company can self-supply station power remotely “falls within FERC’s exclusive jurisdiction,” the Company draws a false conclusion from its citation of the language in this case. *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, at 61,891 n.60 (2001). The cited language is an acknowledgment that, although third-party supply of station power is a sale for end use, and thus not subject to FERC jurisdiction, the delivery of such third-party supply of station power (along with the delivery, in some circumstances, of station power from the supplier’s own remotely located generation sources) may involve transmission of electric energy in interstate commerce, which is the exclusive jurisdiction of FERC.

This does not mean, however, that remote self-supply of station power (which is what WPS would be utilizing in lieu of station power supplied by KU) falls within FERC’s exclusive jurisdiction and is, therefore, a federally mandated right. It means that FERC has exclusive jurisdiction over any transmission service that would be required to deliver such energy, just as it would over any transmission required to deliver such energy from another supplier. The same footnote in the *PJM Interconnection* decision also states that the delivery of station power may involve usage of local distribution facilities, which “may be subject to regulation by a state regulatory authority.” The Company’s federal preemption argument is thus a red herring. Both the cited *PJM* order, and the D.C. Circuit case<sup>7</sup> the Company cites that upholds it, clearly state that there are three ways in which station power may be provided: self-supply by the owner; remote self-supply by the owner; or a third-party end use (i.e., retail) sale.

In addition, as a procedural matter, if WPSC were correct that federal law, by virtue of Schedule 20, trumped Wisconsin law regarding who has the right to supply station power to Fox

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<sup>7</sup> *Calpine Corp. v. FERC*, 702 F.2d 41 (D.C. Cir. 2012).

Energy, then it should have filed its Petition for Declaratory Ruling with FERC. By filing its Petition with the PSCW, instead, WPSC is tacitly conceding that the PSCW does have jurisdiction and can enforce the Territorial Agreement under Wisconsin law without regard to Schedule 20. Indeed, Schedule 20 of the MISO Tariff is not relevant to the only issue before this Commission; namely, whether under the Territorial Agreement and Wis. Stat. § 196.495, KU has the exclusive right to provide station power at retail to the Fox Energy facility.

### **III. KU'S INTERPRETATION OF THE TERRITORIAL AGREEMENT IS REASONABLE AND WILL NOT PRODUCE A "PARADE OF HORRIBLES."**

KU has argued consistently that the Territorial Agreement unambiguously confers upon KU the exclusive right to provide retail electric service to all customers on its side of the Boundary Line,<sup>8</sup> including any customer or premises WPSC might have otherwise had the right to serve as its own property or facilities under Wis. Stat. § 196.495(3). WPSC makes several spurious arguments that this interpretation of the Agreement will lead to unreasonable, absurd, and inequitable results. WPSC Br. at 11-12. KU will address each of these arguments *in seriatim*.

First, WPSC's argument that the previous owners of Fox Energy could have self-supplied station power remotely is another red herring. The previous owners were not public utilities and, therefore, were not subject to Wis. Stat. § 196.495. Thus, whether or not they could have self-supplied station power remotely to the facility is not relevant.

Second, KU's interpretation of the Agreement would not, as WPSC argues, prevent the Company from self-supplying station power from the facility itself. WPSC is currently doing so, and KU does not contest the Company's right to do so as this method of self-supply does not

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<sup>8</sup> This, of course, excludes the three customers listed on Exhibit C.

infringe on KU's contractual right to continue to supply station power under its retail electric tariff to Fox Energy at those times when the facility is not running.

Third, WPSC argues that if KU's interpretation of the Agreement is correct, then WEPCo would have been prevented from serving the Rothschild facility. As shown above, the fact that WEPCo supplies station power remotely to its Rothschild facility within WPSC's territory, a transaction over which the PSCW does not have jurisdiction, has no bearing whatsoever on the meaning of the Territorial Agreement between KU and WPSC.

Fourth, enforcement of the Territorial Agreement by the PSCW will not lead to an inequitable result, as WPSC claims. Enforcement of the Territorial Agreement will simply maintain the status quo. KU will continue to supply station power to Fox Energy under its retail tariff as it has always done, and WPSC will continue to pay the same retail rates, which have been approved by the Commission in various rate cases. Consequently, because Fox Energy is being served under rates approved by the Commission, there can be no "inappropriate subsidy," as WPSC claims.

Finally, WPSC argues that the Commission should not enforce the Territorial Agreement because this will result in the Company saving \$775,000 annually. The Company does not say whether its ratepayers will benefit from this savings. Even assuming this savings would be passed on to WPSC's ratepayers, the ratepayer benefit would be negligible.<sup>9</sup> Regardless, the putative financial impact on the parties themselves or their respective ratepayers should not influence the Commission's decision. The Commission is charged under Wis. Stat. § 196.495(4) to enforce the Territorial Agreement, which unambiguously grants KU the right to provide

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<sup>9</sup> Based on WPSC's reported retail sales for 2013 (\$969,328,855), the annual savings to WPSC ratepayers would amount to no more than an infinitesimal 0.079%. Since Fox Energy is one of KU's largest customers, the loss of this load would have a significant negative impact on KU and its ratepayers – KU's rate of return would decrease by about 0.7% and, after its next rate case, KU's rates would increase by 0.98% across all rate classes. See Exhibit 3 attached to the Stipulated Facts.

station power to the Fox Energy facility under its retail tariff. The Commission must base its decision on the plain language of the Agreement and not on whatever small benefits would accrue to the Company or its ratepayers.

### **CONCLUSION**

For the reasons stated above and in its Initial Brief, KU requests that the Commission dismiss WPSC's Petition for Declaratory Ruling and reaffirm KU's right to continue supplying station power at retail to the Fox Energy facility.<sup>10</sup>

Dated this 9th day of June, 2014.

BOARDMAN & CLARK LLP

By

*/s/ Anita T. Gallucci*

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<sup>10</sup> Should the Commission for whatever reason grant the Petition, KU asks that the order not take effect until KU has had an opportunity to adjust its rates to accommodate for the loss of load. KU would commit to filing a rate case within six months of a final, non-appealable court decision affirming such a Commission order.